

Served: January 23, 1997

NTSB Order No. EA-4520

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 23rd day of January, 1997

_____	)	
Petition of	)	
	)	
WAYNE O. WITTER	)	
	)	
for review of the denial by	)	Docket SM-4162
the Administrator of the	)	
Federal Aviation Administration	)	
of the issuance of an airman	)	
medical certificate.	)	
_____	)	

**ORDER DENYING RECONSIDERATION**

The Administrator has requested reconsideration of NTSB Order EA-4500, issued on November 18, 1996. In that decision, we denied the Administrator's appeal and affirmed the initial decision of the law judge, finding that petitioner had established by a preponderance of the evidence that he is qualified to hold an unrestricted first-class airman medical certificate. Petitioner has filed a reply, urging the Board to dismiss the petition because it is repetitious of arguments already made. See Rule 821.50(d) of the Board's Rules of Practice in Air Safety Proceedings, 49 CFR §821.50(d).<sup>1</sup> We prefer to address certain points in order to clarify the record.

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<sup>1</sup> Petitioner has also filed a motion to dissolve the stay of NTSB Order No. EA-4500, imposed by the Administrator as a result of the filing of the instant request for reconsideration.

The Administrator charged in his appeal that the law judge's discovery rulings constituted reversible error. He now suggests that because our legal analysis on this issue was brief, then surely our review of the rulings was superficial. It was not. We simply disagreed with the Administrator. We do not believe that these discovery rulings were clearly erroneous. Nor do we think that these rulings were outcome determinative.

The gist of our discussion on this issue was that, when the law judge rejected the Administrator's requests as overly broad, the Administrator should have replied by articulating his requests with specificity, or by at least offering an explanation of exactly what evidence he sought<sup>2</sup> and why it was necessary to the preparation of his case. He failed to do so. For example, in the original subpoena requests, the Administrator asserted only that the requested records were "relevant and essential" to his case.<sup>3</sup> In denying the requests the law judge noted,

...the request gave no specific explanation as to how such material is expected to be probative of the issues presented by this case. In the absence of such a showing, the undersigned does not believe that such a broad subpoena request should be granted. As a result, the subpoena request will be denied. See Orders dated August 4, 1995.

In his renewed requests, the Administrator replied that the records he sought were "plainly" or "obvious[ly]" relevant. See Brief of Administrator dated August 8, 1995 at pages 4 and 12.<sup>4</sup>

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<sup>2</sup> The Administrator claims that he did preserve the issue in the record by questioning Doctors Smith and Hudson on the existence of other documents that were the focus of the failed subpoenas. Actually, during cross examination of Dr. Smith it was revealed that he never had the documents sought by the FAA and the proper target of the subpoena was likely the treating hospital. Dr. Hudson was never questioned on the existence of other documents.

<sup>3</sup> We recognize that Rule 821.20(a) requires the application for a subpoena to show only the general relevance and reasonable scope of the evidence sought. Nonetheless, when a law judge rules that the general relevance of the requested evidence is not apparent or the scope of the request seems unreasonable, it is incumbent on the proponent to supplement his application.

<sup>4</sup> Moreover, instead of addressing the concerns voiced by petitioner, the Administrator argued that petitioner had no right to object to the issuance of third-party subpoenas because the Board's discovery rule, 49 CFR §821.20(a), permits only the (...continued)

Under the circumstances, it is clear to the Board that the law judge's discovery rulings were neither biased<sup>5</sup> or arbitrary.<sup>6</sup> It is a proper exercise of a law judge's discretion to control the proceedings, particularly given the lack of specificity of the Administrator's requests.<sup>7</sup>

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(...continued)

target of a subpoena the right to file a motion to contest the subpoena. This argument is too broad. A party to a proceeding certainly is entitled to notice and the opportunity to object to the discovery of evidence that may be used against him. Even the Federal Rules of Civil Procedure (FRCP) recognize that a party may ask the court for a protective order against a subpoena issued to a non-party, and that a court may limit or even deny discovery to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. FRCP 26(c).

<sup>5</sup> The Administrator contends that the law judge showed bias by finding claims of a conspiracy between Delta and FAA relevant for purposes of issuing a subpoena requested by petitioner, but that when the issue of an alleged conspiracy was asserted as a basis for discovery by the FAA, the judge deemed the issue irrelevant. However, the May 8, 1995 Order to which FAA refers contains a request for specific documents believed to be in the possession of a Delta official concerning (1) the rotation when the cockpit event occurred; (2) the subsequent CRM meeting; and (3) Delta's referral of the case to Dr. Berry.

<sup>6</sup> The Administrator claims to be "perplexed" by our comment that if Delta had documented other incidents involving petitioner, they would have volunteered the records. Our point was that if documentation of other work-related incidents existed, surely they would have been reviewed by Delta's medical consultant, Dr. Berry, who later provided FAA with all of his records regarding petitioner. (See Administrator's Exhibit 7 (A-7) at 874 and 953).

<sup>7</sup> The Administrator claims that the Board failed to understand that the discovery in dispute was sought, not from petitioner, but from a third party. We note that the Administrator's Second Request for Discovery and Production of Documents did request, from petitioner, medical records relating to his current and former spouses and any records in his possession dealing with his grievance against Delta. The Administrator filed a Motion to Compel petitioner to produce these records, and the law judge's denial of that motion was raised as an issue in his appeal brief, incorporating the bias argument previously discussed at note 4. The Board simply addressed these similar claims together.

In sum, we found that the law judge's decision rested on his credibility determinations against the Administrator's witnesses. Regardless of whether the Administrator introduced corroborating evidence of other incidents that were mentioned in petitioner's airman medical records, the law judge's ultimate conclusion was that the 1993 cockpit event, when viewed in light of events preceding it, even assuming that they occurred as described in the airman medical records, did not warrant disqualification.

Turning to the next issue, the Administrator asserts that the Board "missed the point" regarding petitioner's sleep apnea condition. The Administrator contends that because petitioner adheres to a carefully monitored, follow-up program for his sleep apnea condition, he is not qualified to hold an unrestricted airman medical certificate. The Administrator asserts that our decision is contrary to Board precedent, citing Board decisions including Petition of Ruhmann, NTSB Order EA-3710 (1992), Petition of Vandenberg, 3 NTSB 2880 (1980), and Petition of Witucki, 3 NTSB 1459 (1978). We disagree.

Ruhmann does not, as the Administrator argues, stand for the proposition that where an applicant for an unrestricted medical certificate has an underlying disease or condition, the existence of contemporaneous good health, whether maintained with or without treatment, is irrelevant. Rather, our holding in that case was that, in order to prevail, an applicant for an unrestricted medical certificate must show that he has no medical or physical condition "...that either presently prevents his safe operation of an aircraft or may reasonably be expected, based on medical judgment, to have that effect at any time within the following two years." Ruhmann, NTSB Order EA-3710 at 12, citing Petition of Vandenberg, 3 NTSB 2880, 2881 (emphasis added). Furthermore, petitioner's case is distinguishable on its facts. In Vandenberg, that petitioner's underlying kidney disease had progressed so far that without dialysis treatment, he could not survive. Similarly, in Witucki, the Board considered the risk of sudden incapacitation too high. Finally, we believe Ruhmann is also distinguishable.<sup>8</sup> Ruhmann failed to prove that it was reasonable to expect him to be seizure-free within the next two years, notwithstanding his brain surgery. Thus, the risk of sudden incapacitation in that case was also of unacceptable proportions. In this case however, we were not convinced that

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<sup>8</sup> The Administrator also cites *Petition of Doe*, 5 NTSB 41 (1985), where the Board found that notwithstanding successful treatment of petitioner's mental condition with lithium, the risk of an outbreak of the underlying disorder, manic depression, was too great.

without treatment, petitioner's symptoms would be suddenly incapacitating. In fact, the record before us shows that his condition was diagnosed only because of his wife's complaints of incessant snoring. The law judge was persuaded that it is therefore reasonable, based on the testimony of petitioner's expert witness, to expect petitioner to be symptom-free for the next two years. We stand by our decision that petitioner's sleep apnea condition does not preclude the issuance of an unrestricted airman medical certificate.<sup>9</sup>

**ACCORDINGLY IT IS ORDERED THAT:**

The Petition for Reconsideration is denied.<sup>10</sup>

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order.

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<sup>9</sup> The Administrator asks the Board to consider an affidavit from an FAA official that purports to show that a time limitation on a medical certificate *a fortiori* renders that certificate a restricted certificate. The Administrator claims that this information could not be presented at hearing because Dr. Hudson's testimony on this point was unexpected. Surprise testimony is typically cured by a continuance, something which counsel failed to request. In any event, the affidavit does little more than restate the regulations. Moreover, any claim that petitioner received only letters stating that his eligibility had been established under FAR 67.401 (formerly FAR 67.19) is belied by his airman records. Compare Letter dated April 27, 1990 (A-7 at 306) and 1990 certificate (A-7 at 307) with Letter dated August 28, 1990 (A-7 at 313) and certificate dated November, 1991 (A-7 at 326). Finally, our decision did not depend on Dr. Hudson's definition of an unrestricted certificate.

<sup>10</sup> In light of the resolution here, we will not address petitioner's Motion to Dissolve Stay, which is moot.